

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
ALBANY GEORGIA**

TIMOTHY POSTELL,	:	
	:	
Petitioner	:	
	:	
v.	:	1:05-CV-96 (WLS)
	:	
CARL HUMPHREY, WARDEN,	:	
	:	
Respondent	:	
	:	

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**ORDER**

Before the Court is a Report and Recommendation from United States Magistrate Judge Richard L. Hodge filed on August 11, 2006, recommending that Respondent's Motion to Dismiss (Doc. 9) be granted. (Doc. 22) Also before the Court is a Report and Recommendation filed on August 11, 2006 by Judge Hodge recommending that Petitioner's Motion for Summary Judgment (Doc. 14) be denied as moot. (Doc. 23). Petitioner filed a timely objection on August 22, 2006. (Doc. 25).

**I. First Report and Recommendation on Respondent's Motion to Dismiss**

It was found that Petitioner was convicted of theft charges in Sumter County, Georgia on three (3) different occasions: 1) in October 1993 based on a guilty plea, for which he received five (5) years probation, 2) in January 1995 based on a guilty plea, for which he received ten (10) years probation, and 3) in March 1997 following a jury trial, for which he received a split sentence of five (5) years to serve, five (5) years probation. (Doc. 9). Thereafter, in May 2001, petitions were entered to revoke Petitioner's probationary periods based on a fourth theft charge. *Id.* Following a July 2001 probation revocation hearing, the remainder of each sentence of probation was revoked. *Id.* It was found that Petitioner did not file a direct appeal of the July 2001 probation revocation.

Pursuant to 28 U.S.C. § 2244(d), it was found that Petitioner had one year from August

10, 2001, the date on which the 30-day period for filing of notice of appeal expired, in which to file a federal habeas petition or toll the limitations period by filing a state habeas petition. *Id.* It was further found that Petitioner first challenged the July 2001 probation revocation in a state habeas petition filed in September 2002 in the Superior Court of Mitchell County, Georgia. *Id.* Petitioner filed the instant federal habeas petition on July 18, 2005. *Id.* It was therefore found that Petitioner's habeas petition was untimely filed.

The Magistrate Judge noted Petitioner's arguments that he was not properly or timely informed of his right to appeal the probation revocations and that he filed a timely notice of appeal, which was incorrectly docketed in another case. *Id.* Upon review, it was found that Petitioner initially raised, but later abandoned, the lack of notice as grounds for relief in his state habeas petition. *Id.* Additionally, it was found that Petitioner filed a notice of appeal with the trial court on August 15, 2001, and an actual appeal on August 29, 2001, both after the August 10, 2001 date by which he was required to file his appeal. *Id.* It was further noted that the instant habeas petition was filed more than three (3) years after the filing of Petitioner's state habeas petition, and that Petitioner has not established any grounds for equitable tolling. *Id.* It is therefore recommended that Respondent's Motion to Dismiss (Doc. 9) be granted and Petitioner's habeas petition be dismissed. (Doc. 22).

In his objections to the Report and Recommendation, Petitioner reiterates arguments made in his Response, namely that he attempted to file a timely appeal of his probation revocation, which were fully addressed by the Magistrate Judge in his recommendation. (Doc. 25; *see also* Docs. 12, 22).

Accordingly, upon full review and consideration upon the record, the Court finds that the Report and Recommendation (Doc. 22) should be, and hereby is, **ACCEPTED, ADOPTED** and made the order of this Court for reason of the findings and reasons set out therein. Respondent's Motion to Dismiss (Doc. 9) is **GRANTED**.

## **II. Second Report and Recommendation on Petitioner's Motion for Summary Judgment**

Based on the recommendation that Respondent's Motion to Dismiss (Doc. 9) be granted, it is found that Petitioner's Motion for Summary Judgment (Doc. 14) is rendered moot. Accordingly, it is recommended that Petitioner's Motion for Summary Judgment (Doc. 14) be denied as such. (Doc. 23). No objection has been filed with respect to this Report and Recommendation.

Upon full review and consideration upon the entire record, and taking into consideration the First Report and Recommendation, and the Court's adoption of the same, the Court finds that the Second Report and Recommendation (Doc. 23) should be, and hereby is, **ACCEPTED, ADOPTED** and made the order of this Court for reason of the findings and reasons set out therein. Accordingly, Petitioner's Motion for Summary Judgment (Doc. 14) is **DENIED AS MOOT**.

#### **CONCLUSION**

For the foregoing reasons, the Reports and Recommendations of August 11, 2006 (Docs. 22, 23), are **ACCEPTED, ADOPTED** and made the Order of this Court for reason of the findings made and reasons stated therein. Accordingly, Respondent's Motion to Dismiss (Doc. 9) is **GRANTED**; and Petitioner's Motion for Summary Judgment (Doc. 14) is **DENIED AS MOOT**.

**SO ORDERED**, this 5<sup>th</sup> day of September, 2006.

/s/W. Louis Sands  
**W. LOUIS SANDS, CHIEF JUDGE**  
**UNITED STATES DISTRICT COURT**